## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

DAVID ALLEN RUSSELL	§	
v.	<b>§</b>	CIVIL ACTION NO. 6:17cv148
BALDEN POLK, ET AL.	§	

## MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ENTERING FINAL JUDGMENT

The Plaintiff David Russell, proceeding *prose*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights in the Texas Department of Criminal Justice, Correctional Institutions Division. This Court referred the case to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Russell was ordered to pay an initial partial filing fee in accordance with 28 U.S.C. §1915(b). When he did not do so, the Magistrate Judge issued a Report recommending dismissal of the lawsuit for failure to prosecute or to obey an order of the Court. Russell filed objections to the Report stating that he is indigent and could not pay the fee. After further review of judicial records, the Magistrate Judge determined that Russell had previously filed at least three lawsuits or appeals which were dismissed as frivolous or for failure to state a claim upon which relief may be granted. The Magistrate Judge therefore withdrew the Report and issued a second Report recommending that the initial fee order be withdrawn, Russell's motion for leave to proceed *in forma pauperis* be denied, and that the lawsuit be dismissed pursuant to the three-strike provision of 28 U.S.C. §1915(g).

Russell did not file objections to this Report, but instead filed a motion asking that his lawsuit be dismissed. The Court has reviewed the pleadings and the Report of the Magistrate Judge

and has determined that this Report is correct. Nonetheless, Plaintiff's request for voluntary dismissal should be granted. *See Carter v. United States*, 547 F.2d 258, 259 (5th Cir. 1977) (plaintiff has absolute right to dismiss his complaint under Rule 41(a), Fed. R. Civ. P., prior to the filing of an answer or motion for summary judgment); *Thomas v. Phillips*, 83 Fed.Appx. 661, 2003 WL 22965565 (5th Cir., December 17, 2003) (citing *Carter*). It is accordingly

**ORDERED** that the Plaintiff's request for voluntary dismissal (docket no. 18) is **GRANTED**. It is further

**ORDERED** that the above-styled civil action is **DISMISSED WITHOUT PREJUDICE** on the Plaintiff's motion. It is further

**ORDERED** that any and all motions which may be pending in this civil action are hereby **DENIED**.

So Ordered and Signed

Jan 25, 2018

Ron Clark, United States District Judge

Pm Clark